89-885
No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

AIR-SEA FORWARDERS, INC.,
a California corporation,
Petitioner,
vs.
AIR ASIA COMPANY, LTD., a limited corporation of the Republic of China;
E-SYSTEMS, INC., a Delaware corporation,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
FROM THE ORDER AND AMENDED OPINION
OF THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court of Appeals violate the Seventh Amendment by affirming the District Court's new trial orders which had been based on the finding that Plaintiff's key witnesses lacked credibility?

2. Did the Court of Appeals erroneously construe Rule 59 of the Federal Rules of Civil Procedure by holding that the District Court was free to disregard the testimony of Plaintiff's key witnesses, notwithstanding corroborating circumstantial evidence, in weighing whether the jury's verdict was against the great weight of the evidence?

PARTIES TO THE PROCEEDING

1. Air-Sea Forwarders, Inc.
2. Air Asia Company, Ltd.
3. E-Systems, Inc.

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PETITION FOR WRIT OF CERTIORARI

I.

STATEMENT OF JURISDICTIONAL GROUNDS

This is a petition for writ of certiorari by Plaintiff-Appellant Air-Sea Forwarders, Inc. ("ASF") from the Order and Amended Opinion of the United States Court of Appeals for the Ninth Circuit in Case No. 86-6683, *Air-Sea Forwarders, Inc. v. Air Asia Co., Ltd.*, 880 F.2d 176 (9th Cir. 1989). (Appendix A herein.) The opinion was filed on June 16, 1989 and was amended on August 15, 1989. ASF's petition for rehearing was denied and its suggestion for rehearing en banc was rejected by order of the Court of Appeals on September 5, 1989. (Appendix B herein.)

The questions presented for Supreme Court review involve the Seventh Amendment of the United States Constitution which provides that "the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law." Specifically, the case presents an issue of first impression to the Supreme Court regarding the proper scope of a trial judge's discretion pursuant to Rule 59 of the Federal Rules of Civil Procedure in ordering a new trial based on insufficiency of the evidence in a case where credibility factors predominated. ASF contends that it was denied its right to trial by jury as a result of the trial judge's usurpation of the function of the jury to judge credibility.

The subject matter jurisdiction of the United States District Court for the Central District of California is based on both diversity of citizenship pursuant to 28 U.S.C. §1332 and the pleading of federal questions pursuant to 28 U.S.C. §1331. The basis for the Ninth Circuit's appellate jurisdiction was the District Court's Judgment on Jury Claims, dated December 2, 1986. (Appendix D and E herein.) A writ of certiorari is sought pursuant to 28 U.S.C. §1254(1).

II.

STATEMENT OF THE CASE

A. Nature of the Case and Relief Requested

This case is a claim by ASF for breach of a 1956 oral agreement and related wrongs by Defendants Air Asia Company, Ltd. ("Air Asia") and E-Systems, Inc.

("E-Systems"). Defendants' breach of contract and wrongdoing stems from an almost thirty year unusual relationship between ASF and Defendants. The unusual relationship arose because at least until 1975, Air Asia was owned by the CIA. ASF and its President, Mr. Erwin Rautenberg, were recruited by the CIA to participate in an elaborate ruse so that Air Asia could qualify for a California tax exemption and other benefits. In exchange, ASF was promised by the CIA that it would not be terminated as Air Asia's exclusive freight forwarder and customhouse broker without good cause. In 1981, Air Asia and E-Systems, which acquired Air Asia in 1975 from the CIA, terminated ASF without good cause. This termination was based on corrupt and bigoted motives. In the course of this termination and after, Air Asia and E-Systems wrongfully and in bad faith denied the existence of the 1956 oral agreement between ASF and the CIA proprietary.

Trial in the United States District Court for the Central District of California before the Honorable Richard A. Gadbois, Jr. resulted in a jury verdict in favor of ASF on its basic breach of contract claim in the amount of $216,151.50. The jury also awarded ASF $6 Million Dollars in punitive damages because of Defendants' bad faith denial of the contract. Finally, the jury awarded ASF its attorneys' fees based on an express finding that the 1956 oral agreement required reimbursement of all attorneys' fees. The jury obviously resolved credibility questions in favor of ASF. However, the District Court stripped ASF of its jury verdict by granting Defendants' motion for new trial on the basic breach of contract claim and by granting Defendants' motions for judgment n.o.v. and conditional new trial on the bad faith denial of contract and attorneys' fees claims. In so

doing, the District Court found that Plaintiff's witnesses were not credible. (Appendix C herein.)

On appeal to the United States Court of Appeals for the Ninth Circuit, the Court reversed the judgments n.o.v. for Defendants on the bad faith denial of contract and attorneys' fees claims but affirmed the conditional new trial orders on the same claims. The Court also held that it presently was without jurisdiction to review the new trial order on the basic breach of contract claim. The Court also held that it was presently without jurisdiction to review the District Court's directed verdict in favor of Defendants of ASF's unfair business practices claim.

By this petition, ASF seeks Supreme Court review of the Ninth Circuit's decision affirming the new trial orders on the bad faith denial of contract claim and the attorneys' fees claim. The jury's verdicts for ASF on these claims hinged almost entirely on its resolution of credibility questions. By rejecting the jury's credibility findings and ordering a new trial, the District Court violated the Seventh Amendment and effectively denied ASF a trial by jury. By affirming the conditional new trial orders, the Ninth Circuit misapplied the standard that when a motion for new trial is based on insufficiency of the evidence, the motions should not be granted unless the verdict is against the great weight of the evidence.

Pursuant to this petition, ASF requests that this Court reverse the Ninth Circuit's affirmance of the conditional new trial orders and remand the case for reinstatement of the jury's verdicts on the bad faith denial of contract and attorneys' fees claims.

B. Statement of Facts

ASF is an international freight forwarder and licensed U.S. customhouse broker. ASF is wholly owned by its President, Mr. Rautenberg. Air Asia is a subsidiary of E-Systems, a Fortune 500 defense contractor. However, prior to its transfer to E-Systems in 1975, Air Asia was a proprietary company of the CIA. A CIA proprietary is a company which appears to the world to be an ordinary business entity but which in reality is owned and controlled by the CIA and is engaged in the furtherance of American intelligence interests. [Ex. 234.]

Air Asia is headquartered in Taiwan and its primary function was to maintain and service the CIA's clandestine airlines, such as Air America. In order to accomplish this, Air Asia was required to have a facility in Los Angeles for purposes of purchasing, inspecting, packing, and shipping large volumes of aircraft and military parts to Taiwan and other locations worldwide.

From about 1950, ASF did the international freight forwarding and customhouse brokerage for Air Asia's Los Angeles packing and procurement operations. International freight forwarding is the service of facilitating the transportation of an exporters' goods to foreign destinations in the most efficient manner. Customhouse brokerage is the service of facilitating the arrival of importers' goods through United States' customs.

A central and fundamental aspect of any CIA proprietary is that its CIA ownership remain secret. This secrecy requirement created a tax dilemma for Air Asia in the early 1950's. [R.T. 94, 939-40, 1022; Exs. 104, 277, 278.] As a company doing business in California, Air Asia was potentially liable for state sales taxes and other taxes on its transactions. However, as a company owned by the United States, it should have been exempt

from such taxes, since the federal government is exempt from state taxes. [R.T. 94-97, 116-17, 1020.] But since Air Asia could not divulge its true ownership even to the California tax authorities, it remained potentially liable for taxes. [R.T. 937, 967-68.]

The enactment in 1955 of California Revenue and Taxation Code §6387 provided a way for Air Asia to escape the tax dilemma. §6387 created an exemption from sales tax for goods "purchased for use solely outside this State and delivered to a forwarding agent, export packer, or other person engaged in the business of preparing goods for export or arranging for their exportation. . . ." [Ex. 307.] Because of its need for secrecy and control, however, Air Asia employed its own export packing crew at its Burbank plant. Yet, the highest executives of the CIA proprietaries realized that if it could be made to appear as if an independent export packer was doing the packing, Air Asia could qualify for the §6387 exemption. [Ex. 278; R.T. 108-10, 938-41.]

Thus, in early 1956, Air Asia devised an elaborate ruse involving ASF. Its central aspect was to create the appearance that ASF was doing Air Asia's export packing. [R.T. 104, 114.] In reality, Air Asia would continue to perform all phases of its own export packing. The ruse would be so elaborate, however, that all outsiders, including the California tax authorities, would believe that ASF was doing the export packing. [R.T. 137-38.] Air Asia would therefore benefit from the §6387 exemption while maintaining its cover. [Exs. 237, 278.]

The ruse was devised in secret and was not initially discussed with Mr. Rautenberg. [Exs. 238, 317.] When informed of the plan and asked to participate by the CIA in mid-1956, Mr. Rautenberg, a Holocaust survivor, felt honored and flattered to be requested by his government

to perform a patriotic service. [R.T. 117.] As a businessman, Mr. Rautenberg realized that this arrangement provided an opportunity for ASF to solidify its commercial relationship with Air Asia.

However, ASF's participation required certain assurances and promises. First, Mr. Rautenberg insisted that he would never be asked to do anything illegal. [R.T. 117.] Second, because it was anticipated that legal services would be regularly required, it was agreed that ASF and Mr. Rautenberg would be held harmless for all expenses, liabilities and attorneys' fees which resulted from the arrangement. [R.T. 121.] Air Asia promised that the arrangement would never hurt nor harm ASF.

Mr. Rautenberg was also promised that ASF would not be terminated as Air Asia's exclusive freight forwarder and customhouse broker without good cause. [R.T. 120, 1376.] In other words, while the covert ASF "packing operation" was fronting for Air Asia in Burbank, the real ASF, operating out of its business offices in downtown Los Angeles, would continue to do all of Air Asia's freight forwarding and customhouse brokerage unless terminated for good cause. [R.T. 120, 129, 334.] This arrangement well-suited Air Asia because it too required a long term relationship, for if ASF terminated the agreement without good cause Air Asia's CIA cover would have been blown. [R.T. 129, 349, 968, 996, 1062-63.]

The 1956 oral agreement was formalized in November 1956 at two meetings attended by Mr. Rautenberg, Mr. George Elmendorf, a tax partner at O'Melveny and Myers, and high-executives of the CIA proprietaries, including Hugh Grundy, the President of Air Asia, and Roy Herold, the Chief of Air Asia's Burbank operations. [R.T. 119-21, 337-38.] At the second of these meetings, Mr. Rautenberg was made officially "witting," *i.e.*,

knowledgeable about the CIA's ownership and inner-workings of Air Asia, and sworn to secrecy about this knowledge and the ruse. [R.T. 119-21.]

The 1956 oral agreement was basically implemented as follows: All Air Asia packing employees were transferred to the "payroll" of ASF and "paid" with ASF checks. [R.T. 141-46, 830-31, 1038.] However, nothing about their jobs changed and they continued to be supervised by Air Asia's Chief Roy Herold. [R.T. 143, 832, 1033-38; Ex. 77, p. 3.] ASF has never been an export packer, and no real ASF employees ever had anything to do with the packing operation or ever knew of the ruse. [R.T. 737-41.]

In order to facilitate the ruse, an "ASF Valley Branch" bank account was created. This "revolving bank account" was wholly separate from the real ASF general account and it was completely funded and controlled by Air Asia. [R.T. 144-48.] All expenses incurred in the packing operation were paid from this revolving account. For example, ASF was to pay "rent" to Air Asia of $400.00 per month. In fact, no real rental was paid. [R.T. 157, 955-56, 1059-60.] Air Asia continually would fund the ASF revolving bank account and then these funds would be used by Air Asia to pay "rent" to itself. [R.T. 157.] The employees' salaries were paid by Air Asia through the revolving bank account as were all other packing operation costs. [R.T. 144-46; 197-98.]

To strengthen the financial aspect of the ruse, Air Asia's bookkeepers used their maiden names, thus posing as ASF employees, when signing checks on behalf of the so-called ASF packing operation. The same bookkeeper would then reimburse the ASF revolving bank account signing Air Asia's checks with her married name. [R.T. 146-50, 836-38; Ex. 75. p. 3.]

A vital aspect of the ruse was the assumption by ASF of Air Asia's collective bargaining agreement with the Teamsters Union covering the packing employees. Obviously, the ruse would not look authentic if the so-called ASF packing employees remained covered by Air Asia's collective bargaining agreement. Therefore, the agreement had to be assigned to ASF. [Ex. 99; R.T. 140, 1070.] Throughout the twenty-five year relationship, Mr. Rautenberg fronted for Air Asia in negotiations on labor matters with the Teamsters Union upon instruction from Air Asia and with the assistance of Air Asia's labor lawyers whose fees were always paid by Air Asia and later E-Systems. [R.T. 171.]

Because the 1956 oral agreement had to be oral by its very nature, the only written agreements would be sham documents designed to make it appear as if ASF was really doing Air Asia's export packing. [R.T. 126-27, 156, 161.] For example, Exhibit 187 is the so-called "packing agreement" dated January 28, 1957. This states that ASF's "consideration" for doing Air Asia's packing was $230.00 per month, a nominal amount even by the admission of Defendants' counsel. [R.T. 71.] No real export packer would undertake this large packing operation for such a nominal profit, and this was no profit at all to ASF as the money was used to defray incidental expenses. [R.T. 162.] The true consideration was the promise that the real ASF would not be terminated as Air Asia's exclusive freight forwarder and customhouse broker except for good cause. [R.T. 162-63.] Exhibit 189, the so-called "Month to Month Tenancy Agreement," also dated January 28, 1957, is even more revealing. As the rent was illusory, the only purpose for the tenancy agreement was to create the false appearance to the public of a real tenancy by ASF at Air Asia's Burbank plant. In this regard, Exhibit 6 is one of the

most important documents in the case. It is a memo written by CIA executive Ward French about the proposed arrangement with ASF. In a revealing statement, Mr. French explained that the purpose of the "rent" was "to avoid questions about the nature of the arrangement."

Thus, the 1956 oral agreement was comprised of the following primary aspects: The tax aspect was Air Asia shielding itself from sales tax liability while at the same time preserving its cover. The documents aspect was the creation of sham agreements designed to "avoid questions about the nature of the arrangement." The labor aspect was the assumption by the covert ASF of the proprietary's collective bargaining agreement. The operational details aspect pertained to the day to day operation of the ruse including the use of maiden names by Air Asia's bookkeepers when conducting ruse transactions out of the ASF revolving bank account. The special projects aspect pertained to clandestine activities that Mr. Rautenberg was requested to perform from time to time such as forwarding equipment to various destinations upon instructions by the CIA. [R.T. 204-07.] In connection with these extraordinary activities, ASF received powers of attorney from other CIA proprietaries such as Air America. [Ex. 27.] The customs aspect pertained to the significant advantages Air Asia could obtain regarding the U.S. Customs laws as a result of the ruse arrangement. For example, Air Asia issued numerous customs documents with Mr. Rautenberg's name printed on the form, and initialed by an Air Asia or E-Systems employee, without Mr. Rautenberg's knowledge or concurrence. The financial aspect pertained to payment of all packing operation costs by Air Asia through the revolving bank account funded by Defendants [R.T. 144-45, 836] as well as Air Asia's promise

to hold ASF harmless and to pay all of ASF's attorneys' fees incurred as a result of the special arrangement. [R.T. 189, 333.]

Of course, ASF continued to render substantial freight forwarding and customhouse brokerage services to Air Asia. Indeed, it was the promise that ASF would not be terminated from these services without good cause that gave ASF the incentive to participate in the packing plant ruse. By all accounts, ASF always performed these services in an exemplary manner. [R.T. 275, 1094, 1270.] The 1956 oral agreement was continuously implemented by Air Asia and E-Systems in all its aspects until ASF's wrongful termination in 1981. [R.T. 199.]

In 1963, Air Asia moved its premises to a larger plant in North Hollywood. In connection with this move and in furtherance of the ruse, a new so-called "packing agreement" and a new so-called "Month to Month Tenancy Agreement" were executed. [Exs. 1, 30.] Those "agreements" were identical to the 1957 versions in every respect except that the nominal compensation to ASF under the packing agreement was increased to reflect higher incidental expenses and the illusory "rental" was similarly increased. These new "agreements" were also sham and Air Asia continued to do its own export packing using ASF as a front. [R.T. 167-68.]

In 1966, ASF and Air Asia executed what has come to be known as the 1966 written agreement. [Exhibit 2.] The evidence was overwhelming that the 1966 written agreement was a sham and, in any event, extremely insignificant. According to Mr. Rautenberg, it was never used as more than a temporary rate sheet and it was certainly never intended to affect the 1956 oral agreement which was consistently implemented until 1981. [R.T. 233, 238-41.] Mr. Rautenberg specifically

testified that clauses referring to the scope of the agreement and the notice required for termination were not meant to be valid or have any effect whatsoever on the 1956 oral agreement. [R.T. 566-68.] Moreover, nothing in the 1966 written agreement referred to the ruse packing arrangement and therefore it could not have superseded the 1956 oral agreement. The clause relating to termination did not refer to the *reasons* for termination, and therefore it could not supersede or affect the good cause for termination requirement of the 1956 oral agreement. And, according to Defendants' own admissions, the 1966 written agreement was "abandoned" and "dropped out of sight" almost immediately after it was signed. [Exs. 272, p. 14 and 231, p. 2.]

The 1966 written agreement was written by Jerry Fink, an attorney employed by Air Asia stationed in Taiwan. He testified that he was concerned that ASF's charges for its services need to be documented. [R.T. 1093-94.] Mr. Fink was, however, totally unaware of the 1956 oral agreement and of the ruse packing operation in North Hollywood. [R.T. 212, 1096.] Since Mr. Rautenberg was sworn to secrecy, he would not inform Mr. Fink of the details of the special relationship. [R.T. 213, 1385-86.]

During the intermittent discussions leading to the signing of the 1966 written agreement, Mr. Rautenberg sought and received assurances from Fink's superiors that the 1966 written agreement would not supersede or affect the 1956 oral agreement. He finally signed the 1966 written agreement based on the repeated assurances from Hugh Grundy, Roy Herold and other high officials that the proposed written agreement would not change nor affect in any manner the overall 1956 oral agreement and especially the good cause for termination requirement. [R.T. 221-30; Exs. 310, 311.]

The 1956 oral agreement was the only agreement that was ever implemented and performed during the parties' twenty-five year relationship. [R.T. 239-240.] An important witness was Harold Rotta, the packing plant foreman at Air Asia from before 1956 until after the 1981 termination. In addition to totally corroborating Mr. Rautenberg's testimony about the day to day workings of the packing plant ruse, [see R.T. 830-849], Mr. Rotta also testified that nothing at all with respect to the packing plant operation changed either after 1966 or after 1975 when E-Systems took over Air Asia. [R.T. 833, 844-45.]

Exhibit 227 is persuasive evidence regarding the continuing existence of the 1956 oral agreement after 1966. This is a memorandum written by Mr. Elmendorf in February, 1969, two and a half years after the signing of the 1966 written agreement. It says in pertinent part "Roy Herold informs me that under the contract between Air Asia and Air-Sea Forwarders, Air Asia is required to pay legal fees and expenses incurred by Air-Sea Forwarders in labor matters involving employees who perform services in connection with Air Asia shipments." Obviously, there is nothing in the 1966 written agreement which says anything about labor matters or attorneys' fees. The only contract Mr. Elmendorf could possibly have been referring to was the 1956 oral agreement.

In 1975, Air Asia was transferred to E-Systems from the CIA. Mr. Rautenberg received assurances from Defendants' executives that the transfer would not affect the 1956 oral agreement or the packing plant ruse. Mr. Rautenberg was told that Air Asia was still a CIA proprietary, "only in a different wrapping," and that E-Systems was closely affiliated with the CIA. [R.T. 265-66, 1390.] He was specifically instructed to con-

tinue fronting for the packing operation and the oral agreement continued to be implemented in all its aspects right up until the time of the termination in 1981. [R.T. 280.] Mr. Rautenberg was thus lied to in 1975 so that he would continue fronting for the packing plant ruse. Obviously, the motivation for this deception was so that Air Asia and E-Systems could continue to qualify for the §6387 tax exemption and considerable other benefits even after the E-Systems takeover.

In August, 1981, ASF was terminated as Air Asia's freight forwarder and customhouse broker without good cause. Prior thereto, E-Systems executives had considered moving the North Hollywood packing and procurement plant to the E-Systems Greenville, Texas Division. When informed of the proposed move, Mr. Rautenberg immediately advised Don Russell, the North Hollywood Branch Manager, that moving the packing and procurement operation to Greenville would be uneconomical and that it would make more sense for Air Asia to remain in Los Angeles and to move into the real ASF's spacious premises, which were now located close to the Los Angeles International Airport. [R.T. 440-43; Ex. 1007.] Mr. Russell requested that Mr. Rautenberg prepare a survey to support his opinion but in the meantime to consider opening an ASF branch office at the Dallas-Ft. Worth Airport. [R.T. 1212-13.]

In February, 1981, Mr. Rautenberg travelled to Texas and met with A.W. Melton, E-Systems' Traffic and Procurement Manager. Melton bluntly told Mr. Rautenberg that in order for ASF to remain the forwarder he would have to pay kickbacks to Melton. When Mr. Rautenberg refused these illicit demands, Melton insulted him with anti-Semitic slurs and threatened to get even with him. [R.T. 298-300; 312-13.]

Although Defendants decided to keep the packing operation in Los Angeles, they soon began courting Dimerco, a Taiwanese company. Because of Dimerco's close relationship with the Republic of China government, Air Asia's President, General Harold Gross, felt considerable pressure to give it the forwarding contract. [Ex. 67.] Dimerco was not a qualified replacement for ASF, however, as its rates were higher, and its qualifications and physical facilities were substantially inferior. [R.T. 483-84, 496-98.]

By July 1, 1981, Defendants had made the decision to switch to Dimerco. [R.T. 459-61; Ex. 232.] ASF was not informed of this decision, however, because Dimerco was not yet ready to handle the account and Defendants continued to require ASF's services in connection with the handling of critical shipments. [R.T. 449-51, 461; Ex. 37.] Thereafter, on July 27, 1981, ASF was fired in a terse letter which dishonestly indicated as the reason for termination Defendants' desire to relocate closer to LAX. [Ex. 9.] This could not have been the reason for ASF's termination since it was the very move Mr. Rautenberg had long advocated. Indeed, Dimerco did not acquire the physical facilities to accomplish this move for many months. [R.T. 501; Exs. 1007, 1019.] Following the termination, Defendants embarked upon a wrongful course of conduct designed to deny ASF its rights pursuant to the 1956 oral agreement.

Mr. Rautenberg immediately protested that the termination was wrongful, and he initiated this lawsuit shortly following the termination. However, Mr. Rautenberg was faced with the dilemma of his secrecy pledge and the fact that the only available documents were the sham documents. Although he demanded a vindication of his rights pursuant to the 1956 oral

agreement, he could not at first be explicit about its existence. [R.T. 622-25.]

Defendants attempted to take advantage of this dilemma by making the packing plant ruse look authentic. [See *e.g.* R.T. 1398-1401.] In an attempt to avoid liability under the 1956 oral agreement, Defendants charged ASF with nonpayment of "rent" at the packing plant knowing that Air Asia always "paid" the "rent" to itself. Defendants cynically threatened that they were going to hold ASF responsible for shipments that had allegedly disappeared from the packing plant. [R.T. 1400-01.] Defendants made this charge knowing that ASF never controlled the packing operation. Defendants also charged ASF with failing to reimburse Air Asia with a double workman's compensation payment when this incident was evidently caused by Air Asia's own employees, who completely controlled the revolving bank account. [R.T. 493-94, 1407.]

These charges formed the basis for the malicious counterclaims asserted by Defendants in this litigation. [C.T. 162.] And, as Defendants became more exasperated by ASF's refusal to drop its suit, they became more vicious. Defendants threatened that unless ASF dropped the suit, it would be boycotted by all defense contractors. [R.T. 486-87.] In one particularly wrongful incident, James Bolding, an officer of Air Asia and E-Systems, threatened ASF with criminal prosecution for tax evasion resulting from the packing plant operation unless ASF dropped its suit. [R.T. 507.] Mr. Rautenberg's testimony about this malicious act was fully corroborated by his former attorney, Mr. Elia Weinbach, who was present when the threats were made. [R.T. 778-79.]

Mr. Rautenberg did not succumb to this wrongful pressure and he finally had no choice but to expose the

packing plant ruse in order to ensure vindication of ASF's rights at trial.

III.

ARGUMENT

By this petition, ASF seeks Supreme Court review of that portion of the Court of Appeals' decision in which it affirmed the District Court's new trial orders on the bad faith denial of contract and attorneys' fees verdicts for ASF. *See Air-Sea Forwarders, Inc. v. Air Asia Co., Ltd.*, 880 F.2d at 189-190. In essence, the Ninth Circuit ruled that in weighing the evidence to determine whether a party is entitled to a new trial based on insufficiency of the evidence to support a verdict, a trial judge is free to exclude from his equation testimony he finds to be incredible. ASF submits that this rule violates the Seventh Amendment because it permits a wholesale usurpation of a jury's function to judge credibility.

Therefore, ASF requests that this Court resolve difficult questions pertaining to the trial judge's exercise of discretion in ordering a new trial in a civil case where credibility questions predominate. The issues presented are extremely significant because if the rule enunciated by the Ninth Circuit is allowed to stand, a trial judge will have unfettered discretion in rejecting a jury's credibility choices and ordering a new trial just because he disbelieves a witness. Such a rule runs afoul of the Seventh Amendment's guaranty of a trial by jury and is contrary to the decisions in other circuits on the same point. The trend of the law has been to circumscribe greatly a trial judge's discretion in ordering a new trial based on insufficiency of the evidence, especially when credibility factors predominate. This case presents an

important question of federal and constitutional law that should be resolved by this Court. The Ninth Circuit's decision conflicts with decisions of other circuits and violates the emerging standard limiting a judge's discretion in ordering a new trial based on insufficiency of the evidence.

Since the seminal case of *Lind v. Schenley Industries, Inc.*, 278 F.2d 79 (3rd Cir. 1960), *cert. denied*, 364 U.S. 835 (1960), the trend in the law has been to scrutinize closely new trial orders based on insufficiency of the evidence. The courts have come to recognize that to give a trial judge unfettered discretion would be to allow him to act as a "thirteenth juror" with veto power over a verdict with which he disagreed. Accordingly, the rule has emerged that where a new trial motion is based on insufficiency of the evidence, strict scrutiny is required:

> "A motion for new trial may be granted on this ground only if the verdict is against the 'great weight' of the evidence, [citations], or 'it is quite clear that the jury has reached a seriously erroneous result' [citations]."

Digidyne Corp. v. Data General Corp., 734 F.2d 1336, 1347 (9th Cir. 1984), *cert. denied*, 473 U.S. 908 (1985).

This stricter standard of review has led an increasing number of courts to hold that a motion for new trial should not be granted based on insufficiency of the evidence when credibility factors predominate. If a trial judge can substitute his judgment for that of the jury on an issue of credibility, then his discretion becomes virtually unfettered since he can overturn a jury's verdict simply because he did not believe the verdict winner's witnesses. Numerous cases have now held that resolution of credibility questions should be left to the jury.

In *Vander Zee v. Karabatsos*, 589 F.2d 723 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 962 (1979), a case strikingly on point, plaintiff sued for breach of an oral contract and defendant denied the existence of any such agreement. The jury believed plaintiff and rendered a verdict in his favor. The trial judge believed defendant and granted a judgment n.o.v. and a conditional new trial based on insufficiency of the evidence. The Court of Appeals reversed the judgment n.o.v. and overturned the new trial ruling, holding that "[T]he trial court's contrary view of the credibility of the witnesses does not justify the granting of a new trial." 589 F.2d at 729.

In *Fundren v. Allstate Ins. Co.*, 790 F.2d 1533 (11th Cir. 1986), the Court of Appeals reversed a new trial order which had been based on the trial judge's view that a key expert witness's testimony was "terribly unimpressive." In making its decision the Court of Appeals concluded that "credibility is a determination to be made by the jury, not the district judge. . . ." 790 F.2d at 1536. The court expressly recognized that in ordering a new trial the trial judge usurped the function of the jury and thus violated the Seventh Amendment. *Id.* at 1534.

Similarly, in *J & H Auto Trim Co. v. Bellefonte Ins. Co.*, 677 F.2d 1365, 1373 (11th Cir. 1982) the Court of Appeals reversed the district court's new trial order by concluding that it was the "jury's jurisdiction" to judge credibility. *See also Williams v. City of Valdosta*, 689 F.2d 964, 973-74, n. 7 (11th Cir. 1982) (in reversing a grant of new trial, the court stated that "the trial judge should not substitute his own credibility choices and inferences for the reasonable credibility choices and inferences made by the jury").

In this case, the Ninth Circuit recognized that "the district court should only enter an order granting a new trial based upon the insufficiency of the evidence if the

verdict is against the great weight of the evidence." 880 F.2d at 190. Yet, incredibly, after recognizing this rule limiting the district judge's discretion, the Court of Appeals proceeded to sanction unlimited discretion by holding that a trial judge is free to reject the jury's credibility choices. The Ninth Circuit's opinion, therefore, is at odds with those cases that have correctly held that decisions regarding credibility are for the jury. In short, the Ninth Circuit overlooked the well established principle that where credibility factors predominate, a trial judge cannot simply substitute his judgment for that of the jury.

In its opinion, the Court of Appeals cited *Landes Construction Company, Inc. v. Royal Bank of Canada*, 833 F.2d 1365 (9th Cir. 1987), for the proposition that in ruling on a new trial motion, a judge may weigh the evidence and assess the credibility of witnesses. 880 F.2d at 190. The Court then goes on to cite *Landes* for the proposition that the district court was free to reject Mr. Rautenberg's testimony. *Id. Landes*, however, does not go that far. *Landes* nowhere states that the judge is free to disregard the entirety of a witness's testimony. In fact, the trial judge in *Landes* did exactly what the trial judge should have done in this case.

In *Landes*, the trial judge recognized that the critical issue of whether there was an oral contract was based essentially on the credibility of the witnesses. Under those circumstances, the trial judge correctly deferred to the jury:

> "I believe it inappropriate to second guess the trier of fact, at least where I cannot say with assurance (as I cannot in this case) that they could not reasonably have found Landes, Scheinberg and Glikbarg more credible than Neapole or plaintiff's theory more compelling

than defendant's."

Landes, 833 F.2d at 1372. Thus, the trial judge was able to restrain herself from substituting her judgment for that of the jury where the critical testimony was in conflict, and the credibility of those witnesses was before the jury.

In an attempt to bolster its reasoning, the Court of Appeals also cited *Cooling Systems and Flexibles, Inc. v. Stuart Radiator, Inc.*, 777 F.2d 485, 487 (9th Cir. 1985) for the proposition that a trial judge's credibility finding is reviewed only for clear error. 880 F.2d at 190. However, *Cooling Systems* is not even remotely on point because it involved a credibility finding in a bench trial in which the trial judge was the trier of fact and did not involve a jury trial where the judge invaded the province of the jury on an issue of credibility. In short, there is no precedent for Ninth Circuit's holding that a trial judge is free to exclude testimony it finds incredible, contrary to the finding of the jury.

More pertinently, in *Venegas v. Wagner*, 831 F.2d 1514 (9th Cir. 1987) (cited at 880 F.2d at 190), the trial judge refrained from substituting his credibility findings for those of the jury where the verdict necessarily involved the resolution of difficult credibility choices. *Venegas*, 831 F.2d at 1519. There, the Court initially noted that where a motion for new trial is based on insufficiency of the evidence, a stringent standard applies such that the motion is proper only if the verdict is against the great weight of the evidence. *Id.* The Court of Appeals affirmed the lower court's denial of the new trial motion as to certain of the parties, and it commended the trial judge for correctly restraining himself from substituting his own conclusions on tough questions of credibility. *Id.*

Notwithstanding its citation of *Venegas*, the *Air-Sea Forwarders* Court did not apply its principle. It would be difficult to find a case more dependent upon credibility choices than *Air-Sea Forwarders*. The trial judge recognized as much. "You know what this is. It's a credibility question. Just that simple." [R.T. 1274.] ASF's case, to be sure, was based to a large degree on the oral testimony of Rautenberg and Herold. So too, however, defendants' case was based largely on the testimony of former CIA officials French, Grundy, and Fink. Thus, as stated by the *Landes* Court: "As this was a suit on an oral contract, the trial consisted of little more than a swearing contest." 833 F.2d at 1371. ASF contends that because this case was, to a great extent, a swearing contest, the trial judge cannot substitute his credibility choices for those of the jury. In holding otherwise, the Ninth Circuit's decision in *Air-Sea Forwarders* is against the great weight of authority and violates the Seventh Amendment.

By allowing the trial judge to reject in total both Rautenberg's and Herold's testimony, the Ninth Circuit's opinion extends a trial judge's discretion on credibility issues well beyond all other established case law. It gives a trial judge complete veto power over a jury verdict. A judge need no longer carefully weigh the evidence. Apparently, a trial judge may now simply state that he does not believe the testimony of any of the witnesses called by a party. With a wave of his hand, the judge can now wipe out a jury verdict because he feels that a party's witnesses are not credible. This is exactly the kind of unfettered discretion that recent decisions have prohibited.

The Ninth Circuit's grant of such vast discretion to a trial judge is not authorized by either the *Venegas* or *Landes* decisions. Rather than follow *Landes*, *Venegas*,

or *Digidyne* (*all* of which held that a judge's discretion is much more limited when considering a new trial motion based on insufficiency of the evidence), this Court's decision establishes a new standard for trial judges, giving them unlimited power to overturn jury verdicts based solely on their views of credibility.

Credibility questions aside, the circumstantial evidence introduced by ASF was overwhelming and itself was sufficient to support the jury verdicts. Consequently, even if the trial judge was justified in rejecting Mr. Rautenberg's and Mr. Herold's testimony, the verdict for ASF was still not against the *great weight* of the evidence.

It was undisputed that the parties did business together without any valid written agreement of any kind for many years. The trial judge even acknowledged that there had to have been an oral agreement of some kind until at least 1966. [R.T. July 9, 1986, p. 5.] When that undisputed fact is viewed in context with defendants' own testimony that their relationship with ASF was to be long lasting so as not to blow their cover [R.T. 968, 996, 1062], as well as Mr. Elmendorf's memo stating that "the most important thing is whether ASF protects us" [Exhibit 93], it is inconceivable that a court would find *both* Mr. Rautenberg's and Mr. Herold's testimony that the oral agreement contained a good cause for termination provision not to be credible. It is also inconceivable that this overwhelming circumstantial evidence would produce a verdict against the great weight of the evidence. In fact, in overturning the judgment n.o.v. on the same claims, the Court of Appeals expressly noted the existence of this circumstantial evidence. 880 F.2d at 188. Yet, in affirming the new trial orders, the Court ignored this same evidence.

IV.

CONCLUSION

This Court should grant this petition because of the important constitutional principle involved and because it is important to establish among the federal courts a uniform standard for ruling on FRCP 59 motions where credibility factors predominate. The intervention of the Supreme Court is essential because ASF was denied its right to a trial by jury. The Ninth Circuit's decision is at odds with the decisions of other circuits and it creates a precedent which provides a trial judge with virtually unfettered discretion to overturn a jury's credibility findings.

DATED: November 28, 1989

INMAN, WEISZ & STEINBERG

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AIR-SEA FORWARDERS, INC., *Plaintiff-Appellant,* v. AIR ASIA COMPANY, LTD., and E-SYSTEMS, INC., *Defendants-Appellees.*	No. 86-6683 D.C. No. CV 81-4103 RAG ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Central District of California
Richard A. Gadbois, Jr., District Judge, Presiding

Argued and Submitted
May 4, 1988—Pasadena, California

Filed June 16, 1989
Amended August 15, 1989

Before: Alfred T. Goodwin, Cynthia Holcomb Hall, Circuit Judges, and Robert C. Belloni,* District Judge.

Opinion by Judge Hall

*Honorable Robert C. Belloni, United States District Judge for the District of Oregon, sitting by designation.

SUMMARY

Torts/Contracts

Reversing the district court's grant of judgment n.o.v. but affirming its conditional order for new trials, the court held that a claim of bad faith denial of the existence of a contract did not fail because of failure to allege the parties shared a special relationship.

Air-Sea Forwarders, Inc. (Air-Sea) filed suit claiming breach of contract and bad faith denial of the existence of contract against Air Asia Company, Ltd. (Air Asia), a CIA cover corporation, and its parent company E-Systems, Inc., a defense contractor. The jury returned a verdict in favor of Air-Sea, but the district court granted Air Asia's motion for judgment notwithstanding the verdict (j.n.o.v.), ruling that Air Asia was not liable for its denial of the existence of the 1956 oral contract because the parties did not share a special relationship. The district court also granted a new trial on the breach of contract claims. On appeal, among numerous issues, Air-Sea contested the entry of the j.n.o.v. on the bad faith claim for both procedural and substantive grounds: that F.R.Civ. P. Rule 51 prohibited j.n.o.v. because Air Asia failed to preserve any alleged error when it failed to object to the relevant jury instruction, and that a special relationship need not be alleged to be liable for denial of the existence of a contract.

[1] Air-Sea's procedural argument failed because the Supreme Court recently concluded that a party's failure to object to relevant jury instructions did not prevent it from challenging the sufficiency of evidence on a legal basis different from that contained in the instructions. [2] A motion for directed verdict depends upon the sufficiency of the evidence up to that point in the trial whereas the jury instructions on the points of law contained in the motion for directed verdict

are simply outside the scope of that analysis. [3] Extensive analysis of California Supreme Court decisions has narrowed the scope of tort liability and the availability of bad faith breach damages, but a special relationship is still not necessary to establish liability for the bad faith denial of the existence of a contract. Importantly, a recent decision has held that bad faith denial of the existence of contract is a cause of action wholly distinct from the breach of the covenant of good faith and fair dealing. [4] There was no other choice but to find that the district court erred by granting a j.n.o.v. on the basis that the parties did not have a special relationship.

COUNSEL

Matthew S. Steinberg, and Drew E. Pomerance, Inman, Weisz & Steinberg, Beverly Hills, California, for the plaintiff-appellant.

James R. Jurecka, Bishton & Jurecka, Los Angeles, California, for the defendants-appellees.

ORDER

The opinion filed June 16, 1989 is amended as follows:

page 6385, first full paragraph, fifth line: change "Air Sea's" to "Air Asia's".

page 6388, third full paragraph, first line: change "Air-Asia" to "Air-Sea".

page 6404, first full paragraph, fourth line: change "Air Sea's" to "Air Asia's".

page 6408, footnote 16, seventh line: change "greater" to "great".

OPINION

HALL, Circuit Judge:

Plaintiff-Appellant Air-Sea Forwarders, Inc. (Air-Sea), appeals the judgment not withstanding the verdict (j.n.o.v.) entered in favor of defendants-appellees Air Asia Company, Ltd. (Air Asia), and E-Systems, Inc. (E-Systems), with respect to Air-Sea's claim of bad faith denial of the existence of a contract, and its separate claim for attorney's fees. The jury had returned a $6,000,000 verdict in appellant's favor on the bad faith claim. The district court also entered conditional new trial orders on these two claims. Air-Sea additionally seeks review of the order granting a new trial on its breach of contract claim and, if this court declines to reinstate the jury verdicts, of the grant of a directed verdict as to its unfair business practices claim.

We reverse the district court's entry of judgments n.o.v. on the bad faith denial of existence of contract claim and the attorney's fees claim. However, we affirm the district court's conditional order for new trials on both these claims. Finally, we are without jurisdiction to review the district court's new trial order on the breach of contract claim, or its directed verdict on the unfair business practices claim.[1]

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[1]On December 2, 1986, the district court entered judgments on the bad faith and attorney's fees claims pursuant to Fed. R. Civ. P. 54(b). The district court's Rule 54(b) order was a prerequisite to our jurisdiction because the district court has not entered a final judgment on the breach of contract claim, which it has set for a new trial. The district court, however, found that there was no just reason to delay an appeal. We review this finding for an abuse of discretion. *See Sheehan v. Atlanta Intern. Ins. Co.*, 812 F.2d 465, 468 (9th Cir. 1987). In *Sheehan*, the court held that a remaining counterclaim did not undermine the reasonableness of an immediate appeal. "The Rule 54(b) claims do not have to be separate from and independent of the remaining claims." *Id.* The district court did not abuse its discretion in entering its Rule 54(b) order. Thus, we have jurisdiction over the j.n.o.v. on the bad faith claim and the attorney's fees claim. Derivatively, we have

I

Appellant is an international freight forwarder and licensed customshouse broker that is wholly owned by its president, Erwin Rautenberg.[2] Appellee Air Asia is a subsidiary of Appellee E-Systems, a defense contractor. Until its acquisition by E-Systems in 1975, Air Asia had been owned secretly by the Central Intelligence Agency (CIA). Air Asia operated an aircraft repair and maintenance facility in Taiwan, primarily to support the CIA's secret Southeast Asian air force, Air America.

Air-Sea began working as Air Asia's international freight forwarder and customshouse broker in 1950. Air Asia purchased goods and materials to support its Taiwanese operations through its office in Burbank, California. Air-Sea facilitated the export of Air Asia's goods to Taiwan, as well as the import of certain goods into the United States. In the interests of secrecy, however, Air Asia itself packed the goods destined for Taiwan. Air-Sea was not aware of Air Asia's CIA ownership.

Air Asia became concerned about the desire of California taxing authorities to levy the state's sales and use taxes on the value of goods passing through Air Asia's Burbank facility. As an agency of the United States, Air Asia was not subject to state taxation. Air Asia, however, did not want to reveal its true ownership just to avoid state taxation. In 1955, an

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jurisdiction over the district court's new trial orders on these claims. *See infra* note 15. The district court, however, did not include in its Rule 54(b) order the new trial order on the breach of contract claim or the directed verdict on the business practices claim. Accordingly, we are without appellate jurisdiction over these claims. *See Sheehan*, 812 F.2d at 468; *see also* note 17, *infra*.

[2]We construe the evidence in the light most favorable to Air-Sea in evaluating the district court's entry of a j.n.o.v. *See Fleming v. Dept. of Pub. Safety*, 837 F.2d 401, 408 (9th Cir.), *cert. denied*, 109 S. Ct. 222 (1988).

opportunity arose for Air Asia to avoid California taxation without disclosing its true ownership; section 6387 was added to the California Revenue and Taxation Code.[3] For the first time, this section exempted from taxation goods purchased for use solely outside the state and delivered to an independent export packer. Thus, if an independent packer did Air Asia's packing, Air Asia would qualify for the section 6387 exemption.

In 1956, Air Asia approached Rautenberg with a proposal that Air Asia use Air-Sea as an independent export packer. Air-Sea had no experience with export packing, but Air Asia officials revealed to Rautenberg the CIA's role and requested his assistance. Pursuant to this ruse, Air Asia entered into a written packing agreement with Air-Sea in January 1957, obligating Air Asia to pay Air-Sea $230 a month for packing services. Air Asia and Air-Sea also entered into a written tenancy agreement, requiring Air-Sea to pay Air Asia $400 per month in rent for space in Air Asia's Burbank facilities. Air Asia's Burbank packing employees were transferred to Air-Sea's payroll and paid with Air-Sea checks. Air-Sea also assumed Air Asia's collective bargaining agreement with the Teamsters Union covering the packing employees.

In reality, Air Asia continued to do its own export packing. Air Asia's office manager in Burbank, Roy Herold, continued to supervise "Air-Sea's" packing employees. Air Asia created a bank account in Air-Sea's name through which it funded all expenses arising from the packing operation, including salaries and rent. Air Asia'a bookkeepers signed checks on this bank account using their maiden names, and Air-Sea never deposited any of its own money into the account. In effect, Air Asia paid rent to itself and salaries to its own employees.

Rautenberg testified that he sought and obtained certain oral assurances from Air Asia in exchange for Air-Sea's participation in the packing sham. Most significantly, Air-Sea was to act as Air Asia's exclusive freight forwarder and customshouse broker and was not to be terminated without good cause. Rautenberg testified that this promise gave Air-Sea the incentive to participate in the packing scheme. He also testified that Air Asia promised to hold Air-Sea harmless for all expenses and liabilities arising from the packing arrangement, including attorney's fees incurred in enforcing the oral agreement.

While the parties had entered into certain written agreements in connection with the packing operation, no written agreement governed Air-Sea's supply of forwarding and brokering services. On August 1, 1966, the parties executed a written agreement purporting to govern Air-Sea's forwarding and brokering services. This agreement described the services Air-Sea was to perform and the rates it was to be paid. The agreement was renewable on an annual basis unless either party gave written notice of termination 30 days prior to the anniversary date. Finally, the agreement specified that it was the entire and only agreement between the parties.

Rautenberg had requested that the agreement contain a provision allowing termination only for good cause, but the final written agreement did not require good cause. Nonetheless, Rautenberg testified that Air Asia's president, Hugh Grundy, Burbank manager Herold, and others, repeatedly assured him that the 1966 written agreement would not supersede the 1956 oral agreement, especially the clause requiring good cause for termination.

On July 27, 1981, Air Asia notified Air-Sea that it had selected another freight forwarder and that Air-Sea's services were terminated effective August 27, 1981. Rautenberg sent Air Asia a telex on August 3, 1981, protesting the notice of termination for failing to be 30 days prior to the August 1,

1981, anniversary date. Rautenberg stated that the 1966 written agreement's termination provisions were "very much in effect."

II

Air-Sea filed this action on August 12, 1981, alleging that Air Asia had failed to provide notice of termination 30 days prior to August 1, 1981, as required by the 1966 written agreement. On May 5, 1982, Air-Sea filed a first amended complaint that alleged for the first time that the parties had a prior oral agreement requiring good cause for termination. It subsequently filed a second amended complaint upon which the case was tried.

The district court bifurcated the liability and damages phases of trial. On April 22, 1986, following the liability trial, the jury returned special verdicts. The jury found that the parties had entered into an oral agreement in 1956, which Air Asia violated in 1981 by terminating Air-Sea without just cause. The jury also concluded, however, that the 1966 agreement was intended to be a valid agreement constituting the only and entire agreement between the parties respecting freight forwarding and customshouse brokering services.

The district court entered an order on May 8, 1986, finding the jury's special verdict inconsistent and entering a j.n.o.v. on the breach of contract claim. The court found that the jury was mistaken as to the legal effect of the 1966 agreement and that the 1956 agreement was superseded as a matter of law. The court also stated that it would entertain a motion by Air Asia for the entry of j.n.o.v. on the bad faith claim and the attorney's fees claim.

Air-Sea immediately sought a writ of mandamus. On June 16, 1986, this court ordered the district judge to reconvene the jury to clarify the ambiguity in its special verdict. The jury then reversed two of its earlier verdicts, finding that the 1966

agreement *was* invalid and *not* intended to be the entire agreement of the parties.

Trial then proceeded on damages, and the jury returned verdicts for plaintiff of $6,000,000 in punitive damages on the claim for bad faith denial of contract, and $216,151.50 in compensatory damages for the underlying breach of contract.

Appellees filed a motion for a j.n.o.v., or in the alternative, a new trial, on all counts. On October 29, 1986, the district court granted appellees' motion for j.n.o.v. on the bad faith claim and the attorney's fees claim. The court also granted a new trial on the breach of contract claim.

III

This court reviews a j.n.o.v. under the same standard as applied by the district court. "J.n.o.v. is proper if the evidence construed in the light most favorable to the nonmoving party permits only one reasonable conclusion as to the verdict and that conclusion is contrary to the jury's; it is improper if reasonable minds could differ over the verdict." *Fleming v. Dept. of Pub. Safety*, 837 F.2d 401, 408 (9th Cir.), *cert. denied*, 109 S. Ct. 222 (1988).

A

The district court concluded that it had made a "mistake" in submitting the bad faith claim to the jury. The court's order acknowledged that the leading case of *Seamen's Direct Buying Service, Inc. v. Standard Oil Co. of Cal.*, 36 Cal. 3d 752, 686 P.2d 1158, 206 Cal. Rptr. 354 (1984), establishes liability for the bad faith denial of the existence of a contract under California law. But the court found that a decision following the *Seamen's* case, *Wallis v. Superior Court*, 160 Cal. App. 3d 1109, 207 Cal. Rptr. 123 (1984), narrowed this tort and made it inapplicable to this case as a matter of law. The district court ruled that pursuant to the *Wallis* decision, Air

Asia was not liable for its denial of the existence of the 1956 contract because the parties did not share a special relationship.

In addition, the district court found that there was "no evidence" that appellees' "alleged" denial of the just-cause covenant was in bad faith, and that the only instance of such denial was in defendants' answer to the first amended complaint, a "privileged assertion." Finally, the court emphasized that appellees at most denied the existence of the terms of the oral agreement, not "the existence of an oral arrangement as such."

Air-Sea contests the district court's entry of the j.n.o.v. on the bad faith claim on both procedural and substantive grounds. Air-Sea first asserts that Federal Rule of Civil Procedure 51 prohibited the j.n.o.v. because appellee failed to preserve any alleged error by not objecting to the relevant jury instruction. Second, Air-Sea disputes the merits of the district court's order.

I

We first consider whether there is a procedural obstacle to the district court's reliance on the *Wallis* decision. Air-Sea strenuously asserts that Rule 51 prohibits the j.n.o.v. in favor of appellees because Air Asia did not object to the jury instructions on the bad faith claim. Neither did Air Asia request a jury instruction stating that liability for the bad faith denial of the existence of contract under California law is appropriate only where the parties have a special relationship. But Air Asia responds that Rule 51 is inapplicable to an appeal from a ruling on a motion for j.n.o.v.

a

Rule 51 provides in part: "No party may assign as error the giving or the failure to give an instruction unless he objects

thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

At the charge conference the day before closing argument, the district court stated:

> *Seamen's* clearly says that if you have a bad faith denial of a valid contract, you have a tort cause of action. . . . You're dead right on the principle, and I don't think there's any question about that. . . . And quite simply, a party who takes the position, in bad faith, that a valid contract doesn't exist, can be liable in tort . . . you know what I'm talking about. (omitting colloquy with attorneys).

Air Asia did not submit a proposed jury instruction on plaintiff's bad faith denial of existence of contract claim, nor did they specifically object to the jury instruction that the court gave.[4] Consequently, if Rule 51 governs a j.n.o.v., appellants correctly identify error below.

b

[1] The Supreme Court recently[5] has concluded, however,

(*Text continued on page 9551*)

[4]On the morning of April 16, 1986, just before defense counsel concluded his closing argument, the court heard from the parties on their objections to the jury instructions. Plaintiff's counsel specifically sought to "make a record" on several instructions that the court declined to give. Defense counsel, however, voiced only one objection with regard to the implied contract instruction.

[5]The Court arguably addressed this issue first in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). In *Aspen*, the jury found that the defendant had monopolized the market for downhill skiing services in Aspen, Colorado, in violation of section 2 of the Sherman Act, 15 U.S.C. § 2. The district court denied defendant's motion for j.n.o.v. Plaintiff contended that defendant had not properly preserved for appeal its argument that it did not misuse its monopoly power, but the Supreme

Court disagreed, stating that "we agree with the Court of Appeals' conclusion, 738 F.2d, at 1517-1518, that [defendant's] motion for a directed verdict did raise the question whether the judgment improperly rested on an assumption that § 2 required a monopolist to cooperate with its rivals." *Aspen Skiing*, 472 U.S. at 600 n.26.

The court of appeals had rejected plaintiff's assertion that defendant's failure to object to the jury instruction on monopolization precluded defendant from challenging "the sufficiency of the evidence under legal principles different from those announced in the instructions." 738 F.2d at 1517. The court found that defendant's two motions for directed verdict "preserved defendant's opportunity to challenge the sufficiency of the evidence on that issue under the truly controlling law, regardless of defendant's failure to object to the jury instructions concerning a duty to cooperate." *Id.*

The court of appeals in *Aspen Skiing* relied on precedent first established by a decision of the Eighth Circuit, *Coca Cola Bottling Co. of Black Hills v. Hubbard*, 203 F.2d 859 (8th Cir. 1953). This circuit has never cited the *Coca Cola* decision as precedent. That court's reasoning merits reproduction in full.

> It is true, of course, that appellant may not challenge on review the correctness of instructions to which he took no exceptions or only a general exception. Rule 51 of the Federal Rules of Civil Procedure. In that sense, and in that sense only, it may be said that the instructions to which no exceptions are taken become law of the case for determining whether the instructions are subject to appeal. But in determining whether a trial court has erred in denying a motion for directed verdict at the close of the evidence, it is the applicable law which is controlling, and not what the trial court announces the law to be in his instructions. This Court must ascertain for itself what the applicable law is, whether the instructions were excepted to or not. A proper motion for a directed verdict and its denial will always preserve for review the question whether under the law truly applicable to the case there was an adequate evidentiary basis for the submission of the case to the jury.

Id. at 862 (citations omitted).

The treatises have relied upon the *Coca Cola* decision to form general propositions about preservation of error through a motion for directed verdict. *Federal Practice, supra*, § 2558, at 670-71 ("Many decisions say that an

that a party's failure to object to relevant jury instructions does not prevent it from challenging the sufficiency of the evidence on a legal basis different from that contained in the instructions.[6] "[T]he failure to object to an instruction does not render the instruction 'law of the case' for purposes of appellate review of the denial of a directed verdict or judgment notwithstanding the verdict." *City of St. Louis v. Praprotnik*, 108 S. Ct. 915, 922 (1988) (plurality opinion) (quoting dissent in *City of Springfield, Mass. v. Kibbe*, 107 S. Ct. 1114, 1118 (1987)).[7] In *Praprotnik*, the defendant city did

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instruction not objected to becomes the law of the case. This may be merely one way of phrasing the general principle that failure to object ordinarily bars later challenge to an instruction. It appears to have no meaning beyond that.") (citing *Coca Cola*); 1B Moore's Federal Practice ¶ 0.404[9], at 166-67 (instructions to which no exception is taken "are not the law of the case for reviewing an order denying a motion for the direction of a verdict.") (quoting *Coca Cola*).

[6]Two Ninth Circuit decisions, however, are arguably incompatible with this reasoning. Accordingly, we must reject them to the extent they are inconsistent with recent Supreme Court precedent. In *Reed v. AMF Western Tool, Inc.*, 431 F.2d 345 (9th Cir. 1970), the jury awarded plaintiffs damages as a result of personal injuries caused by a "runaway" snowmobile manufactured by the defendant. Following the jury's verdict, the defendant moved for judgment in accord with its prior motion for directed verdict, or in the alternative for a new trial. *Id.* at 347. Reviewing the district court's order rejecting defendant's motion for j.n.o.v., the *Reed* court concluded that the defendant's privity and disclaimer defenses were raised improperly for the first time in the post-trial motions. "However, defendants did not raise the above claimed defenses by objecting to the instructions . . . before the case was submitted to the jury." *Id.* at 349 n.2. Based upon this asserted error, the court found that it "was clearly too late to preserve these defenses for this appeal." *Id.*

In *Pierce v. Southern Pac. Transp. Co.*, 823 F.2d 1366, 1371 (9th Cir. 1987), the court also rejected a defendant's argument that the district court improperly had denied its motion for j.n.o.v. following a jury verdict in the plaintiff's favor. As the defendant had failed to preserve its objection to the jury instructions, the court declined to reverse the district court's denial of a j.n.o.v.

[7]While *Praprotnik* is a plurality opinion, a majority of the Court recently relied upon it to reject a plaintiff's argument that the defendant's failure to

not object to a jury instruction that the city was liable under section 1983 for the actions of one "high enough in the government so that his or her actions can be said to represent a government decision." *Id.* at 921. But the city had filed a pretrial motion for summary judgment and a motion for j.n.o.v. that argued the plaintiff had failed to establish the existence of an impermissible municipal policy. *Id.* at 922. The Court found these motions sufficient to preserve the municipal policy issue for appeal, "[a]lthough the same legal issue was raised by both those motions and the jury instruction." *Id.*

[2] The *Praprotnik* Court emphasized that "the focus of [the city's] challenge is not on the jury instruction itself, but on the denial of its motions for summary judgment and a directed verdict." *Id.* at 922. Rule 51 applies only to a party's attempt to "assign as error the giving or the failure to give an instruction." Where a party contests on appeal the district court's ruling on a motion for directed verdict, however, the party's assignment of error is the ruling on the motion for directed verdict, not the subsequent jury instruction.[8] This is just another way of saying that the motion for directed verdict, although sometimes overlapping with the points of law reflected in the jury instructions, is distinct.[9] The inquiry, therefore, focuses on the propriety of granting the motion for directed verdict, which depends upon the sufficiency of the evidence up to that point in the trial; the jury instructions on the points of law contained in the motion for directed verdict are simply outside the scope of that analysis. Accordingly,

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object to a jury instruction prevented the defendant from challenging the sufficiency of the evidence upon a legal theory different from that outlined in the instructions. *See Boyle v. United Technologies Corp.*, 108 S. Ct. 2510, 2519 (1988).

[8]If a party fails to appeal the district court's j.n.o.v. ruling and specifically limits its appeal to error with regard to a particular jury instruction, however, then the *Praprotnik* doctrine would be inapplicable.

[9]While the motion for j.n.o.v. follows the jury's verdict, it must be preceded by a motion for directed verdict at the close of all the evidence. *See* Fed. R. Civ. P. 50(b); *Federal Practice, supra,* ¶ 2537, at 598.

Rule 51 does not impede appellees' ability to defend the district court's reliance on the *Wallis* decision.[10]

2

This court now must determine whether reasonable minds could differ over appellant's bad faith denial of the existence of contract claim. The district court found that Air-Sea and Air Asia lacked the special relationship necessary to justify liability for that claim under *Seamen's*. Air-Sea argues on appeal that the district court erred in holding that liability under *Seamen's* is limited to special relationships, and that bad faith damages are available in an ordinary commercial contract setting. Air-Sea does not argue that it had a special relationship with Air Asia.

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[10]Appellant cites the recent decision of the California Court of Appeal, *Null v. City of Los Angeles*, 206 Cal. App. 3d 1528, 254 Cal. Rptr. 492 (1988). In *Null*, the court held that "where a party to a civil lawsuit claims a jury verdict is not supported by the evidence, but asserts no error in the jury instructions, the adequacy of the evidence must be measured against the instructions given the jury." *Id.* at 496. Federal Rules of Civil Procedure 50 and 51 establish the proper grounds for the entry of a directed verdict and the consequences of failing to object to a jury instruction. "Review of whether there is sufficient evidence to support the finding of fraud is, however, a procedural matter in which we must apply federal law." *The Glovatorium, Inc. v. NCR Corp.*, 684 F.2d 658, 660 (9th Cir. 1982).

Where a federal rule is precisely contrary to state practice, a federal court sitting in diversity must apply the federal rule where it regulates "judicial process for enforcing rights and duties recognized by substantive law." *Olympic Sports Prods. v. Universal Athletic Sales*, 760 F.2d 910, 914 (9th Cir. 1985) (quoting *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941), *cert. denied*, 474 U.S. 1060 (1986)); *see also Hanna v. Plummer*, 380 U.S. 460, 463-64 (1965); *Benny v. Pipes*, 799 F.2d 489, 493 (9th Cir. 1986), *amended*, 807 F.2d 1514 (9th Cir.), *cert. denied*, 108 S. Ct. 198 (1987). Accordingly, we do not find the *Null* decision controlling.

a

In *Seaman's,* the court framed the issue in the first paragraph of its opinion: "May a plaintiff recover in tort for breach of an implied covenant of good faith and fair dealing in a noninsurance, commercial contract." 206 Cal. Rptr. at 356. The plaintiff in *Seaman's* supplied general contractor services to vessels from its waterfront facility. The plaintiff alleged that it had a contract with Standard Oil of California to operate a marine fuel dealership, which Standard breached by cancelling new dealerships during the 1973 oil embargo. *Id.* at 356-57. The *Seamen's* court held that "a party to a contract may incur tort remedies when, in addition to breaching the contract, it seeks to shield itself from liability by denying, in bad faith and without probable cause, that the contract exists." *Id.* at 363.

The *Seamen's* opinion, however, is ambiguous as to the origin of this holding.[11] The court stated that tort damages historically were available for the breach of the implied covenant of good faith and fair dealing only where the contracting parties shared a special relationship. *Id.* at 362. Furthermore, the court noted the need to proceed with caution concerning the expansion of bad faith damages in ordinary commercial settings. *Id.* at 363. Nonetheless, the court stated that its holding was not predicated on the breach of the implied covenant of good faith and fair dealing, and that "[f]or the purposes of this case it is unnecessary to decide the broad question" whether the bad faith breach of the implied covenant required a special relationship. *Id.*

[11]Indeed, the *Seaman's* court's failure to explain *why* it was not necessary to predicate its holding on the implied covenant of good faith and fair dealing, or to *justify* the dramatically greater liability for the bad faith denial of the existence of a contract as compared to the bad faith dispute of a contract's terms, undoubtedly spawned the confusion in the appellate division cases discussed *infra. See Oki America, Inc. v. Microtech Intern., Inc.,* 872 F.2d 312, 314-17 (9th Cir. 1989) (Kozinski, J., concurring).

The *Wallis* decision came six weeks after the *Seamen's* case. In *Wallis,* the plaintiff alleged that his employer had agreed to make certain periodic payments to him following his termination as a 30-year employee of a furniture manufacturing plant. 207 Cal. Rptr. at 127. The plaintiff alleged that the employer had breached the implied covenant of good faith and fair dealing by stopping the payments and lying about the reason for doing so. The Court of Appeal, Fourth District, stated that liability for the bad faith breach of contract was restricted to situations where the parties shared "similar characteristics" to the insurer-insured relationship. 207 Cal. Rptr. at 129. But the court found that the employer-employee relationship satisfied this standard.

The plaintiff in *Wallis* did not allege that the defendant had denied the *existence* of a contract altogether, the type of claim raised in *Seaman's*. Rather, the plaintiff only alleged that the defendant had breached the implied covenant of good faith and fair dealing by disputing the *terms* of the contract in bad faith. This terms-existence distinction is critical, however, because the *Seaman's* court expressly declined to base its holding on the breach of the implied covenant of good faith and fair dealing, which traditionally was limited to special relationships. Consequently, the *Wallis* decision's holding that disputing the terms of a contract in bad faith was actionable only given a special relationship between the parties to the contract in no way indicated that a special relationship was also necessary for the bad faith denial of the existence of a contract.

Nonetheless, the district court below interpreted the *Wallis* decision to confine tort liability for the bad faith denial of the existence of a contract under *Seaman's* to cases in which a special relationship of a quasi-fiduciary nature exists among the parties to the contract. Subsequent decisions of the California courts, however, have described *Seaman's* as recognizing a new tort for the denial of the existence of a contract in bad faith that does not require a special relationship between

the parties. Yet, the district court's interpretation of the *Seaman's* case ultimately was vindicated by a recent California appellate court decision. The California appellate courts now are divided over whether bad faith damages are available for the bad faith denial of the existence of a contract in ordinary commercial contracts. *Compare Martin v. U-Haul Co. of Fresno,* 204 Cal. App. 3d 396, 251 Cal. Rptr. 17 (5th Dist. 1988) (rejecting a special relationship prerequisite for the bad faith denial of the existence of a contract); *Multiplex Ins. Agency, Inc. v. California Life Ins. Co.,* 189 Cal. App. 3d 925, 934-35, 938-40, 235 Cal. Rptr. 12, 17-18, 20-21 (1st Dist. 1987) (same); *and Quigley v. Pet, Inc.,* 162 Cal. App. 3d 877, 890, 892-94 & n.7, 208 Cal. Rptr. 395, 401, 403-04 & n.7 (5th Dist. 1984) (same); *with Okun v. Morton,* 203 Cal. App. 3d 805, 250 Cal. Rprt. 220, 231-233 (2d Dist. 1988) (requiring special relationship for bad faith denial of the existence of contract).

b

The plaintiff in the *Quigley* case, a trucking company, alleged that the defendant improperly had denied the existence of a contract to haul raw walnuts. 208 Cal. Rptr. at 395. The case was tried before the *Seaman's* decision was rendered, however, so the *Quigley* court was left to sort out the meaning of that recent case. The *Quigley* court reversed the jury's verdict on the implied covenant of good faith and fair dealing claim, finding that "[t]here was no admitted special relationship which would provide an exception to the rule restricting relief to contract damages." *Id.* at 403.

Yet, the *Quigley* court remanded the case for a new trial. The court stated that there was "evidence of an outright and unfounded denial of the existence of the contractual relationship." *Id.* at 404. The court interpreted the *Seaman's* case as having created a "new intentional tort" that was not dependent on a special relationship. *Id.* at 401. It stated that the *Seaman's* case did not raise questions about the defen-

dant's *performance* of the contract, *id.*, but only "[t]he unfounded protest of *any* contract term," *id.* at 402.

The *Multiplex* case addressed both the breach of the implied covenant of good faith and fair dealing and the "new tort" recognized in *Seaman's* for the bad faith denial of the existence of a contract. 235 Cal. Rptr. at 20. The *Multiplex* court conceded that a bad faith dispute over the terms of a contract in violation of the implied covenant of good faith and fair dealing was not actionable absent a special relationship between the parties. *Id.* As the trial court had instructed the jury only on the implied covenant claim and did not emphasize the need for a special relationship, the jury's verdict could not stand. But the *Multiplex* court also held that the "new tort" for the denial of the existence of a contract did not require a special relationship. Accordingly, the *Multiplex* court remanded the case for a new trial on both the implied covenant claim and denial of existence of a contract claim. *Id.* at 21.

The *Okun* court conceded that the *Multiplex* and *Quigley* cases interpreted *Seaman's* as creating a new tort distinct from the implied covenant, but rejected them, holding "that denial of the existence of a contract in bad faith and without probable cause falls squarely within the realm of the covenant of good faith and fair dealing." *Okun*, 250 Cal. Rptr. at 232. As a mere subset of the implied covenant, the *Okun* court reasoned that the denial of the existence of a contract is necessarily limited "to those situations involving a 'special relationship.' " *Id.* at 233.

C

In a diversity case, "[w]here the state's highest court has not decided an issue, the task of the federal courts is to predict how the state high court would resolve it." *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1482 (9th Cir. 1986), *modified*, 810 F.2d 1517 (9th Cir. 1987). The decisions of the state's inter-

mediate appellate courts are data that a federal court must consider in undertaking this analysis. *See id.*; *Miller v. Fairchild Industries, Inc.*, 797 F.2d 727, 735 (9th Cir. 1986); *Tenneco West, Inc. v. Marathon Oil Co.*, 756 F.2d 769, 771 (9th Cir.), *cert. denied*, 474 U.S. 845 (1985). But where the state's intermediate appellate courts have reached conflicting results, the federal court must ascertain for itself the most authoritative assessment of state law. *See Estrella v. Brandt*, 682 F.2d 814, 817 (9th Cir. 1982). "Federal courts are not precluded from affording relief simply because neither the state Supreme Court nor the state legislature has enunciated a clear rule governing a particular type of controversy." *Paul v. Watchtower Bible & Tract Soc. of New York*, 819 F.2d 875, 879 (9th Cir.), *cert. denied*, 108 S. Ct. 289 (1987).[12]

d

In considering "all available data," *see Estrella*, 682 F.2d at 817, this court takes particular note of the recent decisions of the California Supreme Court that have narrowed the scope of tort liability. In *Moradi-Shalal v. Fireman's Fund Ins.*, 46 Cal. 3d 287, 758 P.2d 58, 250 Cal. Rptr. 116 (1988), the

[12]The need for a special relationship as a predicate for a claim of bad faith denial of the existence of contract is an open issue in this circuit. The cases that have discussed *Seaman's* generally did so in the context of claims for the bad faith breach of a contract's terms. *See, e.g., Premier Wine & Spirits v. E. & J. Gallo Winery*, 846 F.2d 537, 540 (9th Cir. 1988); *May v. Watt*, 822 F.2d 896, 899 (9th Cir. 1987); *Miller*, 797 F.2d at 735-36. These cases uniformly require some sort of special relationship.

The court in *Landsberg v. Scrabble Crossword Game Players, Inc.*, 802 F.2d 1193, 1199 (9th Cir. 1986), did consider a claim for the bad faith denial of the existence of a contract. The plaintiff had prevailed on summary judgment on his claim that the defendant had denied in bad faith the existence of an implied-in-fact contract. The only issue addressed on appeal was whether *Seaman's* damages were available for the bad faith denial of existence of an implied-in-fact contract. The court concluded that bad faith damages were appropriate, but did not discuss the need for a special relationship.

court, overruling previous precedent, held that a statute prohibiting insurance companies from engaging in unfair practices did not create a private cause of action in favor of either the insured or third-party claimants. In *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988), the court, overruling dicta in *Seaman's* and numerous appellate cases, held that bad faith tort damages are not recoverable for the breach of the implied covenant of good faith and fair dealing in an employment contract. Most recently, in *Thing v. La Chusa*, 48 Cal. 3d 644, 771 P.2d 814, 257 Cal. Rptr. 865 (1989), the court, again overruling precedent, held that a plaintiff may recover for emotional distress caused by viewing the negligently inflicted injury of a third person only if the plaintiff is closely related to the victim and is present at the scene of the injury at the time it occurs and is aware of the accident.

The *Foley* case is of particular interest, because the court analyzed the implied covenant of good faith and fair dealing. The court rejected numerous cases of the courts of appeal that had held employment was a "special relationship" permitting bad faith damages. *See Foley*, 254 Cal. Rptr. at 230-31, 233 n.29. In overruling these cases, the *Foley* court dramatically curtailed the expansion of bad faith liability beyond the traditional insurer-insured relationship.

Significantly, many of the appellate decisions rejected in *Foley* had seized upon the following language from the *Seaman's* case: "No doubt there are other relationships with similar characteristics and deserving of similar legal treatment." *Seaman's*, 206 Cal. Rptr. at 362. Indeed, the *Seaman's* court specifically had stated that the employment relationship "has some of the same characteristics as the relationship between insurer and insured." *Id.* at 362 n.6. The *Foley* court criticized the lower court decisions for uncritically relying upon this "dicta" in *Seaman's*.

The *Foley* court's narrow view of the special relationship justifying bad faith damages was founded upon a comprehen-

sive analysis of the role of tort liability in contractual settings. The court identified these two key factors:

> First, predictability about the cost of contractual relationships plays an important role in our commercial system . . . . Moreover, "Courts traditionally have awarded damages for breach of contract to compensate the aggrieved party rather than to punish the breaching party."

Id. at 227 (omitting citations). Applying these considerations, the court concluded that finding the employment contract to be a special relationship would conflict with "countervailing concerns about economic policy and stability, the traditional separation of tort and contract law, and finally, the numerous protections against improper terminations already afforded employees." *Id.* at 234.

The court's *Moradi* decision expressed similar concerns, noting that previous precedent has "resulted in multiple litigation or coerced settlements, and has generated confusion and uncertainty regarding its application." *Moradi,* 250 Cal. Rptr. at 126. This desire for predictability was also at the root of the *Thing* decision, where the court stated that "drawing arbitrary lines is unavoidable if we are to limit liability and establish meaningful rules for application by litigants and lower courts." *Thing,* 89 D.A.R. at 5544.

e

[3] While the California Supreme Court's recent decisions have narrowed the scope of tort liability in general, and the availability of bad faith breach damages in particular, we cannot agree with the *Okun* court that a special relationship is necessary to establish liability for the bad faith denial of the existence of contract. Most significantly, we note that the recent *Foley* case undermines the rationale for the *Okun* court's conclusion; the California Supreme Court decision

solidly reaffirms the notion that the bad faith denial of the existence of contract is a cause of action wholly distinct from the breach of the covenant of good faith and fair dealing. The *Okun* court, however, rejected the cases that characterize *Seaman's* as creating a new tort, and instead concluded "that denial of the existence of a contract in bad faith and without probable cause falls squarely within the realm of the covenant of good faith and fair dealing." *Okun*, 250 Cal. Rptr. at 233.

The *Foley* court criticized the lower court decision in *Koehrer v. Superior Court*, 181 Cal. App. 3d 1155, 226 Cal. Rptr. 820 (1986), for improperly "extend[ing] the *expressly circumscribed cause of action established in Seaman's based on denial of the existence of the contract*, to find a tort cause of action when the dispute related to a contract term, namely the necessity for good cause as a basis for termination." *Foley*, 254 Cal. Rptr. at 231 (emphasis added). Furthermore, the *Foley* court, again criticizing the *Koehrer* decison, stated that the court of appeal had "acknowledged that we found it unnecessary to base our decision in *Seaman's* on the implied covenant of good faith and fair dealing, but nonetheless concluded that we essentially had done so." *Id.*

The *Okun* court's conclusion that a special relationship is needed *because* the bad faith denial of the existence of a contract is a subset of the implied covenant is patently incompatible with the *Foley* court's subsequent declaration that the *Seaman's* court did not base its decision on the implied covenant. In addition, the *Okun* court minimized the distinction between the bad faith denial of the existence of a contract and the bad faith dispute of a contract's terms. *Okun*, 250 Cal. Rptr. at 232. The *Foley* court, however, emphasized the difference between these two claims, *see Foley*, 254 Cal. Rptr. at 231, and also noted the fundamental difference between claims arising "ex delicto" and "ex contractu," *see id.* at 232.

Finally, we cannot escape the *Seaman's* case itself. The *Seaman's* court noted the danger in permitting a bad faith

cause of action in ordinary commercial contracts. Nonetheless, the court held that it would be appropriate to instruct the jury that the defendant was liable for the bad faith denial of the existence of a contract. *Seaman's*, 206 Cal. Rptr. at 363. The court found it "unnecessary" to decide whether the bad faith breach of the covenant was limited to special relationships, because the denial of the existence of a contract was not predicated on the implied covenant. *Id.* Given the commercial contract at issue in *Seaman's*, the defendant could not possibly have been liable were a special relationship a prerequisite.

[4] Under these circumstances, there is only one way this court could affirm the district court's holding that the denial of the existence of a contract in bad faith requires a special relationship under California law: predict that the California Supreme Court will overrule its holding in *Seaman's*. As a federal court sitting in diversity, however, such a prediction would be unprecedented. Accordingly, we find that the district court erred by granting a j.n.o.v. on the basis that the parties did not have a special relationship.[13]

f

The district court articulated a few alternative grounds for its j.n.o.v. on the bad faith claim. First, the court stated that there was insufficient evidence to support the jury's finding that Air Asia's denial of the existence of contract was in "bad faith." "Under *Seaman's* [a defendant] might be liable for tort damages if [it] denied any liability 'in bad faith and without probable cause, that the contract exists' or denied liability

[13]While we conclude that California law still recognizes a distinct tort for the denial of the existence of a contract in bad faith which does not turn on the presence of a special relationship, our decision should not be interpreted to endorse the usefulness of the distinction between denying the existence of a contract and disputing the terms of a contract. We take California law as we find it.

'without probable cause and with no belief in the existence of a defense [stonewalling].' " *Multiplex*, 235 Cal. Rptr. at 21 (citation omitted).

The district court cited the testimony of various Air Asia employees that they had never heard of the alleged 1956 oral contract. But Herold, Air Asia's former Burbank office manager, testified that there was an oral agreement in 1956. More important, Air-Sea worked as Air Asia's freight forwarder and customshouse broker from about 1950 to 1966 without any written contract. The record indicates that these parties had a substantial relationship over this period that was never governed by a written agreement. This provides sufficient circumstantial evidence that the parties' commercial relationship was governed by some sort of oral agreement prior to 1966. Furthermore, it provides sufficient evidence that Air Asia acted in bad faith by defending this action on the grounds that no such oral contract existed.

The district court also stated that there was insufficient evidence that Air Asia denied "the existence of an oral agreement as such." The court implied that Air Asia at most denied the terms of the contract, not its existence. The jury, of course, returned a special verdict finding that Air Asia had denied the existence of the 1956 oral agreement. The district court's characterization of Air Asia's defense is unsupported by the record. Indeed, Air Asia continues to assert on appeal that "[t]here is indeed a credibility issue with respect to whether or not there ever was a 1956 oral agreement." Finally, the district court labeled Air Asia's denial of the existence of the 1956 agreement "privileged" because it was made in the course of this litigation. The district court cited no California authority for this proposition, and finding none ourselves, we reject it.

B

Appellant also argues that the district court erred in entering a directed verdict against it on the attorney's fees claim. Appellant contends that reasonable minds could differ over whether the parties had an oral agreement that Air Asia would pay Air-Sea's attorney's fees incurred in enforcing the underlying contract.[14] Air Asia does not dispute that it agreed to pay certain of Air-Sea's legal expenses. Specifically, Air Asia concedes that it paid certain attorneys' fees incurred by Air-Sea in connection with Air-Sea's performance of its obligations to Air Asia. The parties differ, however, on whether this agreement provided for the payment of fees incurred in an action to enforce the 1956 contract.

The district judge found Rautenberg's testimony "wholly devoid of credibility." The court stated that it had "an abiding conviction that the verdict in this case was a manifest injustice brought about largely by artifice." Nonetheless, the court acknowledged that it was improper to enter judgments n.o.v. on this basis because "there is evidence in the case which, if believed, would support the jury's conclusion on the point."

In entering a j.n.o.v., the district court "must not substitute its own credibility assessments and its weighing of the evi-

[14]Section 1717 of the California Civil Code reads:

> In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs.

Section 1717(a) governs the alleged agreement between the parties about payment of attorneys' fees incurred in connection with enforcing the good faith clause. *See Coast Bank v. Holmes*, 19 Cal. App. 3d 581, 596, 97 Cal. Rptr. 30, 39 (1971).

dence for the jury's; it must limit itself to determining whether the jury's verdict is supported by substantial evidence." *McGhee v. Arabian American Oil Company*, slip op. at 4460, No. 86-2798 (9th Cir. April 28, 1989); *see also Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1024 (9th Cir. 1985) (for purposes of motion for j.n.o.v. "[i]t is the function of the jury . . . to weigh conflicting evidence and judge the credibility of witnesses"), *cert. denied*, 474 U.S. 1059 (1986).

The district court, however, ran afoul of its own admonition that it is improper for the court to assess a witness' credibility in ruling on a motion for a j.n.o.v. The district court stated that "there is a total lack of evidence supporting the idea that there was a specific fee agreement with respect to enforcing the *terms of an oral agreement*." This is simply not the case. Rautenberg testified that the agreement "positively and definitely" included such fees.

Given Rautenberg's unequivocal testimony, and the requirement that we construe the evidence in the light most favorable to appellant in assessing the j.n.o.v., *see Fleming*, 837 F.2d at 408, there was sufficient evidence to support the jury's verdict on the attorney's fees claim, and j.n.o.v. was improper.

IV

The district court conditionally ordered new trials on the bad faith denial and attorneys' fees claims "[f]or the reasons and on the grounds" that it granted j.n.o.v. as to those claims, "and for the reason that the jury's verdict in this case was grossly excessive." We have jurisdiction to review these new trial orders.[15]

[15]Appellees assert that it would not be appropriate for this court to review the conditional new trial orders. Rule 50(c)(1), however, permits this court to review these orders. "In case the motion for a new trial has

A

"The judge can weigh the evidence and assess the credibility of witnesses, and need not view the evidence from the perspective most favorable to the prevailing party" in ruling on a motion for a new trial. *Landes Const. Co., Inc. v. Royal Bank of Canada*, 833 F.2d 1365, 1371 (9th Cir. 1987); *Fount-Wip, Inc. v. Reddi-Wip, Inc.*, 568 F.2d 1296, 1302 (9th Cir. 1978). We review an order granting or denying a motion for new trial for an abuse of discretion, although the district court should only enter an order granting a new trial based upon the insufficiency of the evidence if the verdict is against the great weight of the evidence. *Venegas v. Wagner*, 831 F.2d 1514, 1519 (9th Cir. 1987).

B

Appellants' evidence on the 1956 oral contract and the attorney's fees claim was based almost exclusively upon Rautenberg's testimony.[16] The district court found both Rauten-

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been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed *unless the appellate court has otherwise ordered.*" Fed. R. Civ. P. 50(c)(1) (emphasis added). While such review is discretionary with the appellate court, we have jurisdiction over the new trial order. *See, e.g., Commercial Union Ins. Co. v. Int'l Flavors & Fragrances, Inc.*, 822 F.2d 267, 275 (2d Cir. 1987); *Firestone Tire and Rubber Co. v. Pearson*, 769 F.2d 1471 (10th Cir. 1985) (appellate court may order new trial where directed verdict found to be inappropriate); *Marino v. Ballestas*, 749 F.2d 162 (3d Cir. 1984) (appellate court has discretion to review alternative order for new trial); *Gordon Mailloux Enter., Inc. v. Firemen's Ins. Co.*, 366 F.2d 740, 742 (9th Cir. 1966) ("We have, it is true, held that upon reversal of a judgment N.O.V., in which a new trial was conditionally granted, this court might also reverse the latter order and direct entry of judgment on the verdict forthwith.").

[16]Herold also testified that Air Asia had agreed to terminate Air-Sea only for good cause and that the agreement included attorney's fees. As the district court noted, however, his testimony was inconsistent and he changed it only after appellants refreshed his recollection at a deposition. The district court found Herold's testimony to be incredible. Consequently, excluding both Rautenberg's and Herold's testimony, the verdict on the attorney's fees claim is against the great weight of the evidence.

berg and Herold to be incredible because they had given prior inconsistent deposition testimony. At trial, Rautenberg sought to explain his prior inconsistent deposition testimony, stating that initially he did not want to reveal the "secret" 1956 agreement. For purposes of ruling on Air Asia's motion for a new trial, however, the district court was free to reject Rautenberg's testimony. *See Landes,* 833 F.2d at 1371; *Cooling Systems and Flexibles, Inc. v. Stuart Radiator, Inc.,* 777 F.2d 485, 487 (9th Cir. 1985) (district court's credibility finding reviewed for clear error). Given the district court's express credibility findings, we affirm the new trial order on the bad faith denial of existence of contract claim and the attorney's fees claim.[17]

V

Air-Sea seeks an order from this court reassigning the case to another judge on remand. Air-Sea alleges that "[t]he trial judge in this case was not a dispassionate jurist." It also contends that the district court improperly received extra-judicial information that affected its views of the evidence before the court.

A

The key event to which Air-Sea points in support of its request occurred on April 9, 1986, during the trial but out of the presence of the jury. The incident arose out of a minor point; Air-Sea sought to introduce "testimony with regard to the fact that Mr. Rautenberg was offered a medal by the CIA."

[17]We do not have jurisdiction to consider appellant's argument that the district court improperly entered a directed verdict on its unfair business practices claims. The Rule 54(b) order refers only to Air-Sea's "jury claims." The court indicated that the "jury claims" are "those claims of [Air-Sea] submitted to the jury as Special Verdicts [A] through J." The unfair business practices claims were disposed of on a motion for directed verdict; they were not submitted to the jury. Accordingly, we lack appellate jurisdiction. *See Sheehan,* 812 F.2d at 468.

Rautenberg had attempted to justify discrepancies between his trial and deposition testimony by explaining that his alleged secrecy oath had prevented him from being entirely truthful at his deposition. Air-Sea also wanted to rebut Air Asia's efforts to downplay Rautenberg's importance to the CIA.

The district court ruled against the introduction of the testimony about the medal. In doing so, the court stated: "He never took an oath for the CIA, and I know that, and I know it independently of this trial."

B

This court has inherent authority to order reassignment to a different district judge, but such action is justified only in rare and extraordinary circumstances. *See United States v. Sears, Roebuck & Co.*, 785 F.2d 777 (9th Cir.), *cert. denied*, 479 U.S. 988 (1986). In making this determination, we consider the following factors:

> (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.

Id. at 779-80 (citations omitted). In *Sears*, this court reassigned the case in order to serve "the appearance of justice and the orderly administration of this court's appellate docket." *Id.* at 781. "The district judge ha[d] been adamant in his rulings," repeatedly dismissing the criminal indictment at

issue in the case. This court waited until "the fourth pretrial appeal in th[e] case" before reassigning it. *Id.*

This court relied on the *Sears* case in reassigning a case in order "to preserve the appearance of justice." *Matter of Yagman*, 796 F.2d 1165, 1188 (9th Cir.), *amended*, 803 F.2d 1085 (9th Cir. 1986), *mandamus granted*, 815 F.2d 575 (9th Cir.), *cert. denied*, 108 S. Ct. 450 (1987). In *Yagman*, pervasive "attorney bickering and misconduct" had provoked "the district court's ire." This court observed that "the massive sanction award and the numerous allegations of bias and overreaching have combined with this poor lawyering to produce an entirely unfortunate end result: the fragile appearance of justice has taken a beating." *Id.*

C

The district judge below was somewhat adamant in his rulings. The district court first found the jury's special verdicts inconsistent and entered j.n.o.v. on the breach of contract claim. This court granted Air-Sea's petition for mandamus, and the jury subsequently returned a substantial verdict for Air-Sea, only to have the district court once again enter j.n.o.v. Nonetheless, while we earlier reversed the district court's j.n.o.v. on the grounds that the jury's special interrogatories were not inherently inconsistent, in fairness, there was genuine ambiguity in the jury's verdicts. This case bears no resemblance to the *Sears* case, where the district court demonstrated an unwillingness to accede to this court's legal directives.

The district court also has expressed strong views about the credibility of Rautenberg, characterizing his testimony as "wholly devoid of credibility," "simply ridiculous," and "wholly incredible." The district court also observed that counsel for Air-Sea had "misled" the jury by blowing "cloak and dagger smoke" at it. But we have concluded that the district court did not commit clear error in finding Rautenberg's

testimony incredible. Furthermore, unlike the *Yagman* case, the record in this case is not replete with evidence of personal animus between the lawyers and the court.

D

This leaves only the district court's statement that it received evidence of Rautenberg's secrecy oath independently from the trial. The district court's reference was made out of the jury's presence, and the district court never instructed the jury that Rautenberg had not taken a secrecy oath.

The circumstances leading to the district court's receipt of this information, however, are hardly mysterious. The parties were well-aware that the district court was in communication with government lawyers concerning the role of classified information. Indeed, the district court entered a supplemental protective order regulating the admission of certain classified evidence, which Air-Sea does not challenge on appeal. Under these circumstances, we see no reason to reassign the case to a different district judge.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

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APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
SEP 5 1989
Cathy A. Catterson, Clerk
U.S. Court of Appeals

AIR-SEA FORWARDERS, INC.,
Plaintiff-Appellant,
v.
AIR ASIA COMPANY, LTD., and
E-SYSTEMS, INC.
Defendants-Appellees.

No. 86-6683
D.C. No. CV 81-4103 RAG

ORDER

Before: GOODWIN and HALL, Circuit Judges,
BELLONI,* District Judge

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed. R. App. P. 35.)

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* Honorable Robert C. Belloni, United States District Judge for the District of Oregon, sitting by designation.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

AIR-SEA FORWARDERS, INC.,
a California corporation,
Plaintiff,
v.
AIR ASIA COMPANY, LIMITED,
a limited corporation of the
Republic of China; E-SYSTEMS,
INC., a Delaware corporation,
Defendants.

No. CV 81-4103 RG

(PROPOSED) ORDER RE:
(1) NEW TRIAL
(2) JUDGMENT NOTWITHSTANDING
THE VERDICT

Motions for judgment notwithstanding the verdict and for new trial have been argued and submitted.

This court has an abiding conviction that the verdict in this case was a manifest injustice brought about largely by artifice. That conviction does not permit a judgment n.o.v. on the basic breach of contract claim,

however, since there is evidence in the case which, if believed, would support the jury's conclusion on the point. There are two issues, however, which the court views as capable of n.o.v. resolution. Accordingly, it will be ordered that (i) a new trial be had on the basic breach of contract claim and related issues and (ii) judgment n.o.v. be entered on the claims for tortious breach of contract and "prevailing party" attorneys' fees.

Breach of Contract

The jury's conclusion that the 1966 written agreement was invalid and did not supplant whatever oral agreement the parties were operating under prior thereto was clearly wrong. The negotiations that led up to the 1966 contract consumed a period of more than three years. They were intense and adversary, and they explicitly covered the subject of termination. That provision was bargained for. Mr. Rautenberg's testimony that he signed the 1966 agreement because the CIA told him to do so is wholly devoid of credibility. Indeed, the entire testimony of Mr. Rautenberg presents serious credibility problems. He postured himself throughout as a CIA insider and confidant whose "secret" agreement in 1956 overrode every later dealing between the parties, contractual and otherwise. That is simply ridiculous. The only "secret" to which he was privy was the true ownership of Air Asia, and the only purpose for sharing this with him was to create a format for avoiding state sales taxes. (The constant use by plaintiff's counsel of the term "tax evasion" is but one example of the kind of tactic that produced this verdict. Of course, the United States could never owe tax to a state.) Mr. Rautenberg did not operate a classified facility and had no need for classified information. He was very seriously impeached by use of his deposition testimony at trial and

then ducked behind this drummed-up facade of "secret agent" to explain why he told different stories under oath.

It is not at all the view of this court that the plaintiff has proven the existence of an agreement against termination without cause. The evidence as to this feature came almost solely from Mr. Rautenberg and may well have been, as the defense puts it, an afterthought. The history of the oft-changing story told by him is accurately set forth on p. 26, *et seq*. of the defense moving papers. To explain all this the plaintiff again wrapped himself in the flag and claimed he was protecting vital state secrets. This is wholly incredible. The existence of some oral understanding in 1956, or any time prior to 1966, could hardly be a secret. ASF and Air Asia had been doing a lot of business together, and it could not be surprising that they had meaningful discussions from time to time about the terms of that relationship. Specifically, how could the fact of a commitment for termination only on good cause be a state secret? As noted above, the only secret Mr. Rautenberg harbored was the true ownership of Air Asia prior to 1976.

Mr. Rautenberg's version of the 1956 termination agreement is supported only by the deposition of Mr. Herold. He states that "Termination would not be done unless it was with good cause" (p. 11). Yet Herold could not remember that fact a month prior to the deposition and recalled it only after a session with Messrs. Rautenberg and Weinbach (his then attorney) the day prior thereto. In that deposition Herold admitted that they suggested to him what his testimony should be (p. 24, *et seq*.).

Herold's deposition testimony was also illuminating as to the content and context of the 1956 arrangement. Rather than a solemn, detailed and highly secret covenant as described by Rautenberg, Herold recalls a

couple of pretty casual conversations involving union matters, sales taxes and an agreement that Air Asia would pay all plaintiff's costs arising from the new procedures.

The jury's conclusion that there was a good-cause termination provision in the 1956 arrangement is — considering the credibility factors — solidly against the weight of the evidence.

The jury in this case was obviously misled by all the cloak and dagger smoke that was blown at it and by the repeated suggestions that Rautenberg was protecting vital secrets of government. That atmosphere prevented a fair trial for the defendant. It is to be hoped that, on retrial, the defendant will produce a senior official of the CIA to testify as to precisely what Rautenberg's role was *vis-a-vis* the Agency, whether in fact he ever took an oath, and what the scope of his secret knowledge was. That official could also be expected to tell the jury that no government official or agent is ever ordered or permitted to lie under oath.

The motion for new trial is granted.[1]

Tortious Breach

On reflection and study the court views the submission of this issue to the jury to have been a mistake. That mistake will be rectified by an order for judgment n.o.v. on the issue.

The authority for this claim is *Seaman's Direct Buying Service, Inc. v. Standard Oil Company of*

---

[1] If plaintiff's counsel are concerned about trying the case again before this district judge they should take some comfort in Wright & Miller, Federal Practice and Procedure, Civil, § 2803 (particularly the last paragraph).

California, 36 Cal.3d 752 (1984). In that case the California Supreme Court held there to be an actionable tort in a situation in which, in addition to breaching the contract, a defendant seeks to avoid liability by denying the existence of the contract in bad faith and without probable cause. The case here is clearly distinguishable from the facts in *Seaman's*, and that court warned against "judicial adventurism" to expand its holding. The criteria for application of the *Seaman's* holding were explicated in *Wallis v. Superior Court*, 160 Cal.App.3d 1109 (1984). An analysis of this case in light of the *Wallis* teaching follows:

1. The parties here were not at all in unequal bargaining positions. Rautenberg's testimony was that he was the preeminent freight forwarder in the industry. In the negotiations leading to the 1966 agreement the parties haggled about its provisions for at least three years in an atmosphere that could hardly be termed serene.

2. If in fact there was an oral agreement not to terminate for good cause it was clearly entered into from a profit motive. Air Asia desired to avoid state sales tax without disclosing its true identity, and Rautenberg wanted to keep a good customer happy without incurring any added expense to do so.

3. Ordinary contract damages in this case are fully adequate to compensate for breach of a commercial arrangement. This is not at all a situation in which the defendant had no incentive not to breach. In addition there was no identifiable damage attributed to the denial.

4. There is nowhere in evidence any special vulnerability on the part of plaintiff. He was not an employee, as was the plaintiff in *Wallis*, but rather an independent contractor. While Air Asia was a valued customer, its business was not even a major part of Rautenberg's gross earnings. He could and did survive

termination of the relationship quite well, and the jury had no difficulty computing a compensatory sum.

5. There is quite literally zero evidence that Air Asia or E-Systems was *aware* of any "vulnerability" on the part of Rautenberg and a great deal of evidence favoring the reverse of that proposition.

In addition there is no evidence of oppression, fraud or malice in the alleged denial of the covenant to retain absent good cause. The "denial" was first made in the answer to plaintiff's first amended complaint — surely a privileged assertion in any event. Testimony of Air Asia officials that they had never heard of such a covenant was not only credible but unrebutted by other than statements attributed to men long deceased and the plaintiff's argument that "they must have."

It should be kept in mind that defendant did not here deny the existence of an oral arrangement as such but only one term thereof. It is an unwarranted expansion of the *Seaman's* holding to assert that differences — even very polar differences — as to terms and conditions of an agreement will subject a defendant to punitive damages for seeking out the courts to resolve the problem. *See Quigley v. Pet, Inc.*, 162 Cal.App.3d 389 (1984).

Attorneys' Fees

There is no question but that Air Asia agreed in 1956 or shortly thereafter to pay O'Melveny & Myers for attorneys' fees incurred in furtherance of its arrangement with ASF and that ASF would never be out of pocket for its cooperation. Even by Mr. Rautenberg's description, however, that commitment could not possibly translate to the "prevailing party" provision commonly seen in well-drafted contracts. There is no evidence supporting the proposition that any agreement ever existed which

would provide attorneys' fees for ASF suing Air Asia as it did in this action. In other words, there is a total lack of evidence supporting the idea that there was a specific fee agreement with respect to enforcing the *terms of an oral agreement*. The jury was simply mistaken on this issue. Again, the court repents itself of having submitted the matter to the jury.

Judgment notwithstanding the verdict will be ordered on the claim for tortious breach and the issue of attorneys' fees.

/s/ Richard A. Gadbois, Jr.
RICHARD A. GADBOIS, JR.
United States District Judge

DATED: 29 OCT 1986

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

AIR-SEA FORWARDERS, INC.,
a California corporation,
Plaintiff,
v.
AIR ASIA COMPANY, LIMITED, a limited corporation of the Republic of China;
E-SYSTEMS, INC., a Delaware corporation,
Defendants.

No. CV 81-4103 RG

MEMORANDUM

Enclosed is a proposed Order which has the effect of granting a motion for new trial on the basic case and motions for judgment n.o.v. on two issues in the case.

The court views this procedure as being the most efficient method of future handling of the case. Since the plaintiff may surely be expected to appeal the n.o.v. rulings a second trial would be conducted with the benefit of the Ninth Circuit's views on these issues.

If either party objects to this approach as a matter of procedure it may file opposition no later than five days from the date hereof.

/s/ Richard A. Gadbois, Jr.
RICHARD A. GADBOIS, JR.
United States District Judge

DATED: 29 OCT 1986

APPENDIX D

BISHTON & JURECKA
James R. Jurecka
2029 Century Park East, Suite 2610
Los Angeles, CA 90067
(213) 556-1801
Attorneys for Defendants

FILED
DEC 2 1986
ENTERED
DEC 4 1986
Clerk U.S. District Court
Central District of California
By _____ Deputy

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

AIR-SEA FORWARDERS, INC.,
Plaintiff,
vs.
AIR ASIA COMPANY LIMITED and
E-SYSTEMS, INC.,
Defendants.

CASE NO. CV 81-4103-RAG (Px)

JUDGMENT ON JURY TRIAL CLAIMS
(RULE 54(b))

This action came on for jury trial on March 18, 1986, the Honorable Richard A. Gadbois, District Judge, presiding.

Some of plaintiff's claims contained in its complaint, as amended, were severed and reserved for subsequent

trial by the court, sitting without jury. All of plaintiff's other claims in its Second Amended Complaint and all of defendant's counterclaims in its Answer were tried before the jury.

By Order dated September 11, 1986, defendants' motion for a directed verdict was granted as to a portion of plaintiff's claims.

Prior to submission to the jury, defendants withdrew all of their counterclaims.

By jury verdicts dated April 23, 1986, the jury rendered verdicts for the defendants on those claims of plaintiff submitted to the jury as Special Verdicts D through J.

By Order dated November 12, 1986, the court granted defendants' motion for judgment n.o.v. on those claims of plaintiff submitted as Special Verdicts B and C, and granted defendants' motion for a new trial on the claim submitted as Special Verdict A.

The court hereby expressly determines, under Rule 54(b) the Federal Rules of Civil Procedure, that there is no just reason for delay in entering final judgment as to all of plaintiff's jury claims other than its claim submitted to the jury as Special Verdict A and as to all of defendants' counterclaims, and hereby expressly directs that final judgment be entered dismissing such claims.

IT IS ORDERED AND ADJUDGED that all of plaintiff's jury claims (other than the claim submitted to the jury as Special Verdict A) be dismissed on the merits, that plaintiff take nothing thereby, and that judgment be entered for defendants Air Asia Company Limited and E-Systems, Inc. thereon.

IT IS FURTHER ORDERED AND ADJUDGED that all of defendants' counterclaims be dismissed on the merits, that defendants take nothing thereby, and that

judgment be entered for plaintiff Air-Sea Forwarders, Inc. thereon.

IT IS FURTHER ORDERED AND ADJUDGED that taxation of costs in this action await the entry of judgment on plaintiff's remaining claims.

RICHARD A. GADBOIS, JR.
RICHARD A. GADBOIS, JR.
United States District Judge

DATED: 12-2-86

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 2029 Century Park East, Suite 2610, Los Angeles, California.

On November 12, 1986, I served the within proposed JUDGMENT ON JURY TRIAL CLAIMS on the interested parties in said action, by placing a true copy thereof enclosed in a sealed envelope and causing the same to be personally hand delivered by messenger to the offices of:

Matthew Steinberg, Esq.
Weisz & Steinberg
9777 Wilshire Blvd., Suite 805
Beverly Hills, CA 90210

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on November 12, 1986, at Los Angeles, California.

/s/ Lisa Lin

APPENDIX E

IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

AIR-SEA FORWARDERS, INC.,
Plaintiff,
v.
AIR ASIA COMPANY LIMITED and
E-SYSTEMS, INC.,
Defendants.

No. CV 81-4103 RG (Px)

ORDER RE: NEW TRIAL

Motions for judgment notwithstanding the verdict and for new trial have been argued and submitted.

By Order dated October 29, 1986, this court indicated its proposed ruling granting, inter alia, defendants' motion for judgment notwithstanding the verdict on the claim for tortious breach and the issue of attorneys' fees.

For the reasons and on the grounds set forth in pages 5 through 7 of the Order dated October 29, 1986, and for the reason that the jury's verdict in this case was grossly excessive, this court believes that defendants' motion for a new trial should also be conditionally granted on the two issues for which judgment n.o.v. was granted,

pursuant to Rule 50(c) of the Federal Rules of Civil Procedure.

IT IS SO ORDERED.

/s/ Richard A. Gadbois, Jr.
RICHARD A. GADBOIS, JR.
United States District Judge

DATED: December 2, 1986

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

AIR-SEA FORWARDERS, INC., a California corporation,
Petitioner,

vs.

AIR ASIA COMPANY, LTD., a limited corporation of the Republic of China; E-SYSTEMS, INC., a Delaware corporation,
Respondents.

STATE OF CALIFORNIA)
) ss:
COUNTY OF LOS ANGELES)

Donald A. Johnson, being first duly sworn, deposes and says: I am a citizen of the United States and a resident of or employed in the county aforesaid. I am over the age of 18 years and not a party to the said action. My business address is 3550 Wilshire Boulevard, Suite 916, Los Angeles, California 90010. On this date, I served the within PETITION FOR WRIT OF CERTIORARI on the interested parties in said action by placing three true copies thereof with first-class postage fully prepaid, in the United States post office mailbox at Los Angeles, California, in sealed envelopes addressed as follows:

JAMES R. JURECKA, ESQ.
LAW OFFICES OF JAMES R. JURECKA
Suite 2610
2029 Century Park East
Los Angeles, CA 90067

That affiant makes this service, for MAURICE C. INMAN, JR., Counsel of Record, INMAN, WEISZ & STEINBERG, Attorneys for Petitioner herein, and that to the best of my knowledge all the persons required to be served in said action have been served.

Donald A. Johnson

On November 28, 1989, before me, the undersigned, a Notary Public in and for said County and State, personally appeared Donald A. Johnson, known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

Witness my hand and official seal.

OFFICIAL SEAL
Theodore Matsuo Wilden
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My comm. expires NOV 30, 1990

Theodore M. Wilden
Notary Public in and for said county and state